United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: September 28, 2004

TO : Gary W. Muffley, Regional Director
Region 9

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: M & G Polymers USA, LLC
Case 9-CA-41007

512-5036-6726
512-5036-6737
530-6033-7084
530-8045-3725

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) and (5) under the principles of McClatchy Newspapers[1] when, following a bona fide bargaining impasse, it implemented its proposed system of merit-based employee assessments to identify employees for permanent layoff. We conclude that this charge allegation should be dismissed, absent withdrawal, because the Employer, unlike the employer in McClatchy, has not attempted to exercise unfettered discretion in either designing or implementing its employee assessment procedures and criteria, but has developed objective criteria through the collective-bargaining process and is implementing them with meaningful opportunity for Union participation.

FACTS

M&G Polymers USA, LLC ("the Employer") operates a plant in Apple Grove, West Virginia, making polyethelene terephthalate (PET) and other polymers for bottles and other containers. Employees at the plant are represented by the United Steelworkers of America, International Union, and its Local 644L (collectively referred to as "the Union"). The Union and Employer were parties to a collective-bargaining agreement that was effective from November 6, 2000 to November 6, 2003.

The plant employed about 192 unit employees as of November 2003. Sometime in 2001, the Employer had informed the Union that an entire production unit, the "MDU," which employed about 50 people, would be shut down in 2004. The parties began negotiations for a successor agreement in September 2003. Early in the negotiations, the Employer notified the Union that another of its production units, the "CP-2," with about 50 employees, would also be permanently shut down as of the first quarter of 2004 due to over-

[1] 321 NLRB 1386 (1996), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998) (McClatchy II).

capacity and lack of global demand for the product. As a result of the two shutdowns, about half the bargaining unit will be permanently laid off by the end of 2004.

Seniority in the workplace was apparently the most critical issue in the negotiations. Facing imminent permanent layoffs, the Union stood fast on its demand that seniority be the primary factor in determining who would be retained. In the past, employees had not been evaluated, and all job actions such as bumping, promotions, and layoffs had been based on seniority.

On December 13, 2003, the Employer proposed as a "last, best and final offer" on layoffs that affected employees be selected for permanent layoff or placement in other positions based on whether they possess "skills, abilities and other attributes ... greater than those of employees in unaffected areas." Seniority was to be considered only where all other factors were equal. In an accompanying "Letter of Understanding," the Employer set forth seven specific criteria that would govern the identification of employees who, in the event of permanent layoffs, would bump into other positions.[2]

On January 7, 2004,[3] the Union made a counter-offer regarding the evaluations to be used for layoffs, proposing different criteria for evaluating employees and assigning numerical percentage weights to each criterion. On January 17, the Union adjusted its proposal by changing the weights. Seniority, for example, was lowered from 50 to 20 percent.[4] Although the Union engaged in discussions with the Employer about both the criteria and weights, it remained adamant that seniority be a major factor in determining selection for layoff.

On February 7, the Employer presented its final contract offer to the Union and, regarding layoffs, used its own criteria but added weights for each of the specific

---

[2] The proposed criteria included, for example, an employee's demonstrated skill in job performance, efficiency, and prior attendance record.

[3] All subsequent dates are 2004.

[4] On January 15, the Union filed a charge against the Employer in Case 9-CA-40802 alleging, among other things, that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to bargain about criteria to be used for layoffs. On April 23, the Region determined to dismiss the charge, but the Union elected to withdraw it.

criteria. Seniority was still not a listed criterion, but would be considered only where all other factors were equal. The Employer also stressed the need to reach agreement so that an orderly shutdown of CP-2 and MDU could begin by the end of March. The Employer noted that the assessments of the employees needed to begin immediately for that to take place. The final version of the proposed Letter of Understanding attached to the final offer, in pertinent part, set forth the following criteria and weights:

> (1) employees' demonstrated skill and knowledge in performing his/her job, including results (speed and accuracy) of the application of such skill and knowledge -- 30%;
>
> (2) cooperation and teamwork with co-workers and supervisors in performing their jobs, including oral and written communications with supervisors and co-workers, sharing knowledge and information with supervisors and co-workers, and helping less experienced employees become as accomplished as possible -- 25%;
>
> (3) employee's demonstrated commitment to workplace health, safety, and environmental protocols -- 15%;
>
> (4) level of education, training and certifications -- formal and on-the-job -- related to their job or other jobs in the plant and willingness to learn new skills -- 15%;
>
> (5) prior disciplinary record, including any prior instances of insubordination, refusal to follow directives of management, and the like, as permitted by Article V of the 2003 Agreement -- 10%;
>
> (6) prior attendance record (without regard to documented FMLA leave) -- 5%.

The Letter of Understanding also provided that the assessment would be reviewed with the employee, and that if the employee disagreed with the assessment, the procedures set forth in a related side-letter on expedited arbitration would apply for the Union to contest the assessment.

The Union rejected the Employer's final offer. On February 9, the Employer declared impasse in contract

negotiations. The Region has concluded that this was a bona fide impasse.[5]

By letter dated February 10, the Employer announced that by February 24 it would initiate the evaluation process related to the pending closures of CP-2 and MDU.[6] On February 12, the Employer sent the Union the "Evaluation Program for USWA Represented Employees" and solicited the Union's comments. This "evaluation program" was a very detailed version of the Employer's bargaining proposal. For each of the six evaluation criteria, the program set forth numerous specific factors that the Employer would be considering.[7] The Union apparently did not comment on, or request bargaining over, the evaluation program. It appears that the Employer then began having its supervisors complete the employee evaluations. The parties held four other bargaining sessions in March, but the Union made no proposals to break the impasse.[8]

On March 19, the Employer informed the Union that it would begin "communication sessions" with the employees about March 21. The Union was invited to send representatives to those sessions. The Region's investigation established that the "communication sessions" were meetings during which each unit employee was merely read his or her evaluation by a supervisor. Some Union officials who attended those sessions questioned how the assessments were made, but for the most part both the employees and Union officials said nothing. The employees were allowed 24-48 hours to submit comments or corrections,

---

[5] Specifically, the Region concluded that by January 26, the parties had exhausted all discussion about seniority and were not close to an agreement on this issue, and that the Union had made no further proposals.

[6] The Employer did not immediately implement the entire final offer, but only those proposals relating to the employee evaluations and permanent layoffs.

[7] For example, the category "Demonstrated Skill and Knowledge in Job Performance" listed 20 items of consideration, including: reliably completes administrative requirements, i.e., log sheets, check sheets, etc., related to routine operations; reliably monitors and adjusts controls during normal operations for optimal equipment and process performances; and quickness and effectiveness in response to abnormal or emergency conditions.

[8] The Union has made no request for any additional bargaining since March 19.

but apparently no one did so. The Union was not apprised, following those sessions, as to who would be laid off, exactly when layoffs would occur, or how the Employer had differentiated among the employees.

By letter dated March 31, the Employer informed the Union that layoffs had taken place or would take place. In fact, about 58 unit employees were laid off on that date and escorted from the plant without prior notification. Senior employees were laid off along with junior employees. The Employer's March 31 letter did not address how those particular employees were selected for layoff. The letter also advised the Union that about 8 other employees would be laid off beginning about April 11, and that 19 additional employees would be laid off between April 18 and June 14. Although the Employer gave the Union the names of those to be laid off, it furnished no information as to the basis for the selection of those particular employees.

On April 1, the Union wrote a letter requesting that the Employer cease and desist from terminating unit employees. The Union also requested copies of all unit employees' evaluations along with documentation used to support the evaluations.[9] The Union made no further demand to bargain about why or how particular employees had been selected for layoff. On April 2, the Employer informed the Union in writing that the layoffs had been "implemented based on the criteria that have been the subject of extensive negotiations...." On April 23, the Employer laid off an additional eight unit employees in accordance with its March 31 announcement to the Union. No further layoffs have taken place, although more are likely as the Employer completes its shutdown of the CP-2 and MDU units.

It appears that some grievances have been filed regarding the layoffs. The Employer is processing the grievances but has refused to arbitrate them because there is no contract in place providing for arbitration.[10]

---

[9] On May 13, the Union filed a charge against the Employer in 9-CA-41123 alleging that the Employer violated Section 8(a)(1) and (5) of the Act by delaying or refusing to provide this information. On July 26, the Region determined to issue a complaint, absent settlement, only with respect to the Employer's delay in providing the information. At this time a settlement proposal is pending.

[10] The layoff proposal implemented by the Employer provided for arbitration of the *assessments*, rather than the layoffs themselves.

ACTION

We conclude that the Section 8(a)(1) and (5) allegations based upon the implementation of the merit-based employee assessments should be dismissed, absent withdrawal.

In McClatchy Newspapers, the Board held that, in the absence of good-faith bargaining over criteria and procedures, discretionary merit increases fall into a narrow class of proposals concerning mandatory subjects that cannot be implemented after impasse.[11] The employer's proposal in that case gave the employer broad, ongoing discretion to change wage rates, and provided no standards or criteria that would limit this discretion. It also exempted all pay decisions from contractual grievance and arbitration procedures, and placed other restrictions on the representational role of the union in the merit-determination process.[12] The Board in McClatchy explained that the doctrine of post-impasse implementation of employer proposals was developed as a means of fostering the collective-bargaining process by helping to break impasse.[13] It noted, however, that where post-impasse implementation would seriously harm, rather than further, the bargaining process, the doctrine should not and does not apply.[14] The Board concluded that an employer could not implement proposals giving it unlimited discretion (i.e., without explicit standards or criteria) over future pay increases; permitting it to do so would undermine, rather than foster, the collective-bargaining process.[15] The Board reasoned that the ongoing exclusion of the union from meaningful bargaining as to wage rates, leaving them entirely within the employer's discretion, would impact all future negotiations on this key term of employment and would

---

[11] 321 NLRB at 1390.

[12] Id. at 1386-1387.

[13] Id. at 1389-1390.

[14] Id. at 1390 (citing arbitration, union security, dues checkoff, no-strike provisions, and withdrawal from multi-employer bargaining as "exceptions to the implementation-after-impasse doctrine [that] carry as their underlying theme the need to foster the collective-bargaining process").

[15] Id. at 1390-1391.

disparage the union by showing its complete incapacity to act for the employees in this regard.[16]

In a passage directly applicable to the instant case, however, the Board in McClatchy specifically noted that nothing in its decision precludes an employer "from attempting to negotiate to agreement on retaining discretion over wage increases," or, failing to achieve such an agreement, "from [implementing such a proposal] if definable objective procedures and criteria have been negotiated to agreement or to impasse."[17] In such cases, the Board noted, the union will have "retain[ed] its ability to act as bargaining representative."[18]

In KSM Industries,[19] the Board extended the McClatchy rationale to a non-wage proposal, holding that the employer lawfully bargained to impasse over, but could not implement, a medical and dental insurance proposal.[20] The proposal, on its face, permitted the employer to unilaterally change virtually every aspect of the benefit, including the provider, the plan design, the level of benefits, and the administrator; the sole limitations were requirements that changes would be company-wide and employee premiums would be capped at a specified dollar amount.[21] The Board found that the implemented health benefits proposal left no room for bargaining about the manner, method, and means of providing medical and dental benefits during the term of the contract.[22] Accordingly, as in McClatchy, the proposal

---

[16] Id. at 1391, citing NLRB v. Katz, 369 U.S. 736, 746-47 (1962).

[17] Ibid.

[18] Ibid.

[19] 336 NLRB 133 (2001).

[20] Id. at 135. Noting that health insurance, like wages, is a mandatory subject of bargaining and an important term and condition of employment, the Board found KSM's proposal akin to the merit wage proposals in McClatchy, and stated that there was "no principled reason" to distinguish McClatchy on the basis that health insurance rather than wages were involved. Id. at n.6.

[21] Id. at 135. Although the proposal called for discussions with the union, the employer admitted that it did not intend to negotiate changes in the plan. Ibid.

[22] Ibid.

nullified the union's authority to bargain over the existence and terms of a "key" employment condition and rendered its implementation "inimical to the post-impasse, on-going collective-bargaining process."[23]

We conclude that the merit-based employee assessments implemented here do not come within the McClatchy exception to the "implementation after impasse" rule. As noted above, McClatchy explicitly does *not* preclude an employer from trying to negotiate the retention of its discretion over a key term and condition of employment and, upon impasse, from implementing that proposal where "definable objective procedures and criteria" have been negotiated to impasse. Thus McClatchy requires that criteria and procedures be defined, but not that they be defined in such a way as to remove completely the discretionary aspects of the employer's proposal. McClatchy carefully avoids prohibiting management implementation of a bargaining proposal under the conditions and in the manner of the present case.

As set forth above, the employer in McClatchy did not negotiate about how it was going to implement its discretion, including the specific factors it would consider for the amounts or timing of merit increases, but rather merely insisted on unlimited management discretion. Moreover, the employer's proposal failed to provide for union participation, either in the initial determination of merit increases for particular employees, or afterwards through the contractual grievance procedure.

In contrast, the Employer here allowed for and engaged in bargaining to the greatest possible extent short of ceding its core demand for managerial discretion in this area. Its layoff proposal, which was negotiated in conjunction with a proposed side-letter that enumerated the criteria that would be followed for layoff-related employee evaluations, was the subject of numerous bargaining sessions and Union counterproposals. As a result of this bargaining, the Employer proposed different evaluation criteria and assigned numerical percentage weights to each criterion, as first proposed by the Union. Moreover, the Employer allowed continued Union participation in the evaluation process. For example, on February 12, the Employer sent the Union its very detailed "evaluation program" and solicited the Union's comments. The Union was informed of, and invited to attend, the employee "communication sessions" held by the Employer

---

[23] Ibid. Cf. Monterey Newspapers, 334 NLRB 1019, 1021 (1991) (successor's setting "tightly circumscribed" pay band system for new hires distinguishable from Board merit-pay cases involving unfettered employer discretion).

to review evaluations. And, the Employer's implemented layoff proposal allowed the Union to contest employee assessments through the procedures set forth in a related side-letter on expedited arbitration.[24]

In sum, unlike the situations in McClatchy and KSM, the Employer here engaged in extensive bargaining concerning its layoff proposal, including bargaining over "specific objective procedures and criteria" to be followed in implementing its merit-based employee assessments. Moreover, the Employer allowed continued Union participation, including an opportunity to have the criteria's application reviewed in arbitration. In these circumstances, the Employer's implementation will not disparage the Union's status or the integrity of the collective-bargaining process. Therefore, we conclude that the McClatchy exception to the implementation-after-impasse doctrine is inapplicable in this case.

Accordingly, the Region should dismiss the charge allegation, absent withdrawal, as the Employer did not violate Section 8(a)(1) and (5) by implementing its permanent layoff proposal.

B.J.K.

[24] We note that despite these opportunities, the Union in this case did not request further bargaining over the detailed evaluation program or seek to contest (through arbitration) individual employee assessments.